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**IN THE  
COURT OF APPEALS OF INDIANA**

RAY L. BLAIR and CHRISTINE J. BLAIR,

Appellants-Defendants,

VS.

GARY C. PADGETT, JR., RACHEL L. PADGETT, KAREN OVERPECK and THE MOORESVILLE AREA SENIOR CENTER, INC.,

Appellees-Plaintiffs.

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No. 55A01-0505-CV-230

APPEAL FROM THE MORGAN SUPERIOR COURT  
The Honorable Christopher Burnham, Judge  
Cause No. 55D02-0408-PL-309

**OCTOBER 10, 2006**

## MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

### STATEMENT OF THE CASE

Defendants-Appellants Ray L. Blair (“Ray”) and Christine J. Blair (jointly the “Blairs”) appeal the trial court’s judgment and award of damages in favor of Plaintiffs-Appellees Gary C. Padgett, Jr. and Rachel L. Padgett (jointly the “Padgetts”), Karen Overpeck (“Overpeck”), and The Mooresville Area Senior Center, Inc. (“Senior Center”) (collectively “Appellees”).

We affirm in part and reverse and remand in part.

### ISSUES

The Blairs present three issues for our review, which we restate as:

- I. Whether the trial court erred by entering judgment in favor of the Appellees.
- II. Whether the trial court erred in determining the damages of the Appellees.
- III. Whether the trial court erred by allowing a witness of the Appellees to testify as an expert.

### FACTS AND PROCEDURAL HISTORY

This lawsuit concerns a certain lake in Morgan County. The lake lies upon and touches adjacent parcels of real estate, which are owned by different parties. The Blairs’ property consists of almost seven acres that they purchased from Roberta Swinney in 1994. The Padgetts purchased their property, consisting of approximately one acre, from a development corporation in 2000. The east side of their property is adjacent to the Blairs’ property.

The Senior Center acquired its property from Morgan County by deed in 1996. Its property consists of approximately five acres and is adjacent to and to the east of the Blairs' property and adjacent to and to the west of Overpeck's property. In 1986, Overpeck inherited from her father's estate approximately 5.35 acres of real estate that is adjacent to and to the east of the property owned by the Senior Center.

In 1990, prior to selling the land to the Blairs in 1994, Roberta Swinney built the lake upon the property in memory of her late husband with the consent of the adjoining landowners. Although the lake was built primarily to satisfy the desire of Roberta's late husband to provide enjoyment for the senior citizens in the community, it was also for the use, benefit, and enjoyment of all the adjacent landowners. There was no written agreement regarding the lake's usage and ownership; however, since its creation the lake has been used and enjoyed by all of the adjoining landowners, as well as members of the public. The Padgetts fish in the lake, and people from the surrounding area have rented the Senior Center and held weddings by the lake. A local scout troop built benches around the lake for the senior citizens to use and had requested to use the Senior Center land and lake access for a campout. In addition, a local rescue team has used the lake to practice their water rescue tactics. Moreover, all of the adjoining landowners have helped to maintain the lake and dam. The Padgetts mowed around the dam, kept the emergency spillway pipe clear of debris and animals, added stone to slow the erosion, stocked the lake with fish, and applied copper sulfate to slow algae growth. Overpeck and her husband have treated the entire lake with copper sulfate, mowed around the lake, picked up trash around the lake, and cleaned debris from the dam.

The lake covers an area that stretches from the north side of the Blair property, south to the northeast section of the Padgett property, then east and northeast through the property owned by the Senior Center to the northwest corner of the Overpeck property. The largest portion of the lake bed is contained on the Blairs' property, and the next largest area of the lake bed is contained on the property owned by the Senior Center. Overpeck's property contains only a small part of the lake bed, and the Padgetts' property contains the smallest part of the lake bed, although it also contains a very small part of the dam, as well as the emergency spillway. The dam is located across the south side of the lake on property owned by the Blairs, the Senior Center and the Padgetts.

In June 2004, Ray dug a trench in the dam, and in August 2004, he began pumping water out of the lake. The draining of the lake caused the water level to recede and, in turn, caused much of the wildlife to leave the lake area, caused the vegetation around the lake to die, and caused a terrible odor around the lake. The Appellees filed this lawsuit against the Blairs seeking to enjoin the Blairs from pumping water from the lake. Following a hearing, the trial court entered a preliminary injunction enjoining the Blairs from draining the lake. Trial to the bench was later held, and the trial court denied the Appellees' request for a permanent injunction. However, the trial court entered judgment in favor of the Appellees and awarded each of them money damages for the harm to their property caused by Ray's trenching of the dam and pumping of water from the lake. The Blairs appeal this judgment.

## DISCUSSION AND DECISION

### I. PROPERTY INTERESTS

The Blairs contend that the trial court erred by entering judgment in favor of the Appellees. Specifically, the Blairs argue that the Appellees have no legal interest in the lake, and, therefore, there was no basis for the trial court to award them damages as a result of Ray's trenching the dam and pumping water from the lake.

When the trial court enters findings of fact and conclusions of law, we apply a two-tiered standard of review: first, we determine whether the evidence supports the findings and, second, whether the findings support the judgment. *S.C. Nestel, Inc. v. Future Const., Inc.*, 836 N.E.2d 445, 449 (Ind. Ct. App. 2005). The trial court's findings and conclusions will be set aside only if they are clearly erroneous. *Id.* "Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them." *St. John Town Bd. v. Lambert*, 725 N.E.2d 507, 518 (Ind. Ct. App. 2000). A judgment is clearly erroneous when it is not supported by the findings of fact. *Id.* Put another way, a judgment is clearly erroneous when a review of the record leaves us firmly convinced that a mistake has been made. *S.C. Nestel, Inc.*, 836 N.E.2d at 449. In determining whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom. *Id.* Moreover, we will not reweigh the evidence or assess witness credibility. *Id.*

Strictly speaking, property rights associated with rivers and streams are termed riparian rights, whereas property rights associated with lakes and ponds are designated as littoral

rights. *Parkison v. McCue*, 831 N.E.2d 118, 133 (Ind. Ct. App. 2005), *trans. denied* by *Kraus v. McCue*, 841 N.E.2d 191 (Ind. 2005). However, as many jurisdictions use the term “riparian” to refer to both classes of ownership, we will do so here. *Id.*; *see also Abbs v. Town of Syracuse*, 655 N.E.2d 114, 117 (Ind. Ct. App. 1995), *trans. denied*.

A determination of riparian rights generally turns upon whether a lake is navigable or nonnavigable. *Berger Farms, Inc. v. Estes*, 662 N.E.2d 654, 656 (Ind. Ct. App. 1996). A nonnavigable lake is one enclosed and bordered by riparian landowners. *Id.* In the instant case, the evidence clearly shows that the lake lies upon and is enclosed and bordered by the property of the Blairs, the Padgetts, Overpeck, and the Senior Center. Thus, the trial court correctly concluded that the lake is a nonnavigable lake. Upon finding that a lake is nonnavigable, the appropriate riparian rights may be determined.

The owner of land upon which a nonnavigable lake is located owns and has the right to control the surface of the lake. *Id.* “When a nonnavigable lake covers the property of more than one landowner, ‘each owner has the right to the free and unmolested use and control over his portion of the lake bed and water thereon for boating and fishing.’” *Id.* (quoting *Sanders v. De Rose*, 207 Ind. 90, 95, 191 N.E. 331, 333 (1934)). Having determined that the lake at issue here is a nonnavigable lake, the trial court properly concluded that the Appellees are entitled to the free and unmolested use and control of their portion of the lake.

The term “molest” is defined as “[t]o disturb, interfere with, or annoy.” AMERICAN HERITAGE COLLEGE DICTIONARY 896 (4<sup>th</sup> ed. 2002). Therefore, the Appellees have the right to the use and control of their property without any interference

or disturbance. The trial court concluded that, by draining the lake, the Blairs interfered with the Appellees' rights. Specifically, the Blairs interfered with and, in some cases, completely eliminated the Appellees' rights to use the portion of the lake that is on their property because the draining of the lake reduced the water level past the Appellees' property lines. The reduction of the water level also affected the Appellees' rights to the use and control of their portion of the lake by hindering their ability to boat and fish in the water and by causing the death of vegetation that surrounded the lake, which then caused an offensive odor around the lake.

In *Berger Farms, Inc.* this Court determined that a property owner is entitled to enjoin the owner of a neighboring property from engaging in activities such as boating and fishing upon the portion of nonnavigable lake owned by the property owner. 662 N.E.2d 654. The Court reasoned that each owner has the right to the free and unmolested use and control over his portion of the lake bed and water thereon and that when the owner of a neighboring property engaged in activities on the property owner's portion of the lake, it interfered with this right. We liken this situation to the one at hand, which appears to be an even more egregious interference of the property owners' rights to the free and unmolested use and control of their portion of the lake. The evidence discloses, and the trial court found, that this lake is a nonnavigable lake, built with the consent of all adjoining landowners and with its waters overlying and touching the property of adjoining landowners, that was altered by one of the landowners to the detriment of the other landowners. None of the property owners can be said to have the free and unmolested use and control of their portion of the lake if any of the other neighboring

landowners can unilaterally drain the lake. As the trial court properly concluded, the Blairs interfered with the Appellees' rights to the unencumbered use and control of their portion of the lake. Thus, the evidence supports the trial court's findings and the court's findings support its judgment in favor of the Appellees.

## II. DAMAGES

Next, the Blairs assert that the damages awarded to Overpeck and the Senior Center are not supported by the evidence. The computation of damages is a matter within the trial court's discretion. *Harlan Bakeries, Inc. v. Muncy*, 835 N.E.2d 1018, 1034 (Ind. Ct. App. 2005). No degree of mathematical certainty is required in awarding damages; however, the amount awarded must be supported by the evidence and may not be based upon mere conjecture, speculation, or guesswork. *Id.* In actions involving property damage, the appropriate measure of damages is the difference between the fair market value of the property prior to and after the injury where the injury is permanent. *Id.* at 1034-35. To support an award of compensatory damages, facts must exist and be shown by the evidence which provide a legal basis for measuring the plaintiff's loss. *Id.* at 1035. Therefore, the damages must be based on some fairly definitive standard, such as market value, established experience, or direct inference from known circumstances. *Id.* Stated another way, a trial court's award of damages will not be disturbed on appeal when the amount is within "the bounds of the probative evidence adduced at trial." *Id.*

The Appellees presented the testimony of Michael Arnold, a real estate appraiser. He stated that his objective was to determine what effect the draining of the lake would have on the value of the property of the Appellees. He testified that he used the market



approach and looked at the prices of nearby lakefront lots and non-lakefront lots. In doing so, he stated that the Padgetts' lot would be worth between \$12,300 and \$14,400 less if it was a non-lakefront lot. Tr. at 174. Arnold stated that the dollar figure was for the Padgetts' property only because, although the amount represented the reduction in value of only the lot, the amount was based upon the lot being used for residential purposes. He explained that he could not determine a dollar amount for the Senior Center's property or Overpeck's property because there were no existing comparables for non-residential lakefront lots. Generally, he stated he would expect the dollar amount to be greater due to the larger lakefront area of the property owned by Overpeck and the Senior Center.

In its findings, the trial court rounded Arnold's appraisal of reduced value to \$12,000 for the Padgetts' property. Appellant's Appendix at 12. It then approximated the percentage of shoreline of the Padgetts, the Senior Center and Overpeck. Appellant's App. at 11-12. The court estimated that Overpeck has approximately twice as much lakefront area as the Padgetts, so it multiplied \$12,000 by 2 to award Overpeck \$24,000. Appellant's App. at 12. In the same vein, the court estimated that the Senior Center has approximately 20 times the lakefront area as the Padgetts, so it multiplied \$12,000 by 20 to award the Senior Center \$240,000. Appellant's App. at 12.

The trial court's findings are not supported by the evidence of decreased property values presented at trial. Arnold specifically stated that the reduction in value to which he testified only pertained to residential lots and that he could not assign a dollar amount to the property owned by Overpeck and the Senior Center because the lots are not being

used for residential purposes. In addition, there was no evidence of the actual amount of shoreline or the percentage of shoreline occupied by each property. Furthermore, there exists no basis for applying the residential values to the Senior Center, which is not and cannot be used for residential purposes. The deed from the Morgan County Commissioners to the Mooresville Area Senior Center, Inc. provides that “At such time as said real estate ceases to be used as a Senior Center or for similar civic purposes, it shall revert to the Grantor.” Appellant’s App. at 35. Therefore, the evidence does not support the findings, and the findings do not support the judgment awarding the Senior Center \$240,000 and Overpeck \$24,000.

### III. EXPERT WITNESS

The Blairs’ final issue is that the trial court erred by allowing a witness of the Appellees to testify as an expert witness. The decision to admit or exclude evidence lies within the sound discretion of the trial court. *Strack and Van Til, Inc. v. Carter*, 803 N.E.2d 666, 670 (Ind. Ct. App. 2004). The trial court’s determination is afforded great discretion on appeal. *Id.* To that end, we will not reverse the trial court’s decision absent a showing of manifest abuse of discretion. *Id.*

The Appellees called James Rees to testify regarding the condition of the dam and the lake and to discuss the possible ramifications of either allowing the dam and the lake to remain in their present condition or of draining the lake entirely. The Blairs objected to Rees offering such testimony because, they assert, there was a lack of sufficient foundation to qualify him as an expert witness. The trial court allowed Rees to testify over the Blairs’ objection.

Indiana Evidence Rule 702 provides that a witness may be qualified as an expert by virtue of “knowledge, skill, experience, training, or education.” Evid. R. 702(a). However, in the present case, neither the court nor the Appellees characterize Rees’s offered testimony as expert opinion testimony. Additionally, when the court ruled to allow Rees’s testimony, it did not designate him as an expert witness. Counsel for the Appellees began by questioning Rees as to his experience with dams. Rees explained that he has been involved with the construction of at least one dam and the construction and maintenance of several waterways. Counsel for the Blairs objected by stating, “Your Honor, if he’s being asked to give expert opinion, we would suggest that there’s not sufficient foundation.” Appellant’s App. at 92. In response, counsel for the Appellees explained to the court that Rees’s testimony was being used to demonstrate the effects of the Blairs’ trenching of the dam. The court then ruled that it would allow Rees’s testimony for that purpose.

Witnesses possessing specialized knowledge beyond the ken of the average juror are often referred to as “skilled witnesses” or “skilled lay observers.” *Cansler v. Mills*, 765 N.E.2d 698, 703 (Ind. Ct. App. 2002), *trans. denied*. A “skilled witness” is a person with “a degree of knowledge short of that sufficient to be declared an expert under Ind. Evid. Rule 702, but somewhat beyond that possessed by the ordinary jurors.” *Id.* (quoting *Mariscal v. State*, 687 N.E.2d 378, 380 (Ind. Ct. App. 1997, *reh’g denied, trans. denied*)). Skilled witnesses may testify about their observations, opinions or inferences that are based solely on facts within their own personal knowledge. *Cansler*, 765 N.E.2d at 703. In order to be admissible under Evidence Rule 701, opinion testimony of a skilled

witness must be (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or a determination of a fact in issue. *Id.*; Evid. R. 701.

In the present case, we think the testimony of Rees is more properly designated as opinion testimony by a lay witness. Rees's testimony consists of a report of his personal observations of the lake and the dam from the vantage point of the Senior Center and his opinion about the effects of the trenching of the dam upon the dam and the lake. Thus, Rees testified about his observations based upon his years of experience with dam-building and waterway maintenance and from his examination of this particular lake. Whether the testimony is that of an expert or that of a skilled lay observer, the determination of whether the witness is qualified to give an opinion is a matter within the discretion of the trial court. *Zemco Mfg., Inc. v. Pecoraro*, 703 N.E.2d 1064, 1070 (Ind. Ct. App. 1998), *trans. denied*. In this case, the trial court did not abuse its discretion when it allowed Rees to testify.

### CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the trial court properly entered judgment in favor of the Appellees and that it was not error for the trial court to allow Rees to testify about his observations and opinions regarding the lake and the dam. The trial court erred by awarding damages in the amount of \$24,000 and \$240,000 to Overpeck and the Senior Center, respectively, because the evidence did not support the findings on this issue. Therefore, we affirm the entry of judgment in favor of the Appellees, as well as the admission into evidence of Rees's testimony. We reverse

the damages award to Overpeck and the Senior Center and remand for action consistent with this opinion.

Affirmed in part, reversed and remanded in part.

BAILEY, J., and CRONE, J., concur.